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State v. Evans Respondent's Brief Dckt. 39888

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 39888
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2007-1371
)	
KIRKLEY ALLEN EVANS,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE MICHAEL E. WETHERELL
District Judge

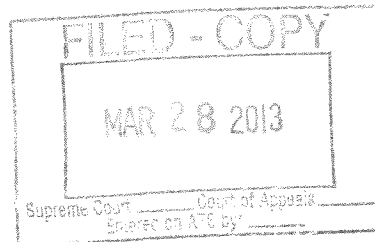
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case.....	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE.....	4
ARGUMENT	5
The District Court Lacked Jurisdiction To Consider Evans' Motion For Credit For Time Served, And Even If It Had Jurisdiction, Evans Has Waived His Argument Because He Failed To Preserve It For Appeal.....	5
A. Introduction	5
B. Standard Of Review	6
C. Because The Issue Addressed By The District Court Was Not The Legality Of The Sentence, The Court Lacked Jurisdiction To Consider It	6
D. Even If The District Court Had Jurisdiction, Evans Has Waived His Issue On Appeal Because He Failed To Present It To The District Court.....	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

CASES

PAGE

<u>Robinson v. Spicer</u> , 86 Idaho 138, 383 P.2d 844 (1963)	9
<u>Row v. State</u> , 135 Idaho 573, 21 P.3d 895 (2001)	8
<u>State v. Ensign</u> , 38 Idaho 539, 223 P. 230 (1924)	6
<u>State v. Evans</u> , 2009 Unpublished Opinion No. 530, Docket 35652 (Idaho App., July 17, 2009)	1
<u>State v. Fodge</u> , 121 Idaho 192, 824 P.2d 123 (1992)	8
<u>State v. Hale</u> , 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989)	6
<u>State v. Jakoski</u> , 139 Idaho 352, 79 P.3d 711 (2003)	6
<u>State v. Johnson</u> , 75 Idaho 157, 269 P.2d 769 (1954).....	6, 7
<u>State v. Josephson</u> , 124 Idaho 286, 858 P.2d 825 (Ct. App. 1993)	7
<u>State v. Kavajecz</u> , 139 Idaho 482, 80 P.3d 1083 (2003).....	6
<u>State v. Rodriguez</u> , 119 Idaho 895, 811 P.2d 505 (Ct. App. 1991)	6

STATUTES

I.C. § 18-309	1, 5, 7
I.C. § 18-901	1
I.C. § 18-905	1
I.C. § 18-915	1
I.C. § 19-4203	7
I.C. § 20-209	7

RULES

I.C.R. 35.....	5, 6
----------------	------

STATEMENT OF THE CASE

Nature Of The Case

Kirkley Allen Evans appeals from the district court's order denying him credit for post-judgment time served.

Statement Of The Facts And Course Of The Proceedings

The Idaho Court of Appeals stated the procedural history of this case as follows:

Kirkley Allen Evans was charged with aggravated assault upon a law enforcement officer, I.C. §§ 18-915, 18-905, 18-901, with a persistent violator enhancement. Pursuant to a plea agreement, Evans entered an *Alford* plea to the charge and the state agreed to dismiss the persistent violator enhancement. Evans was sentenced to a unified term of ten years, with six years determinate.

State v. Evans, 2009 Unpublished Opinion No. 530, Docket 35652, p.1 (Idaho App., July 17, 2009). The Court of Appeals issued an opinion affirming Evans' judgment of conviction and sentence, ruling that the district court did not abuse its discretion by imposing an excessive sentence. (Id., pp.1-2.) A Remittitur was entered on October 5, 2009. (R., p.6 (register of actions report).)

On March 9, 2012, Evans filed a "Motion for Credit for Time Served" pursuant to I.C. § 18-309. (R., pp.14-15.) Along with his motion, Evans filed an affidavit explaining the basis for his motion as follows (verbatim):

1. On 08/21/08, I was sentenced in the above case #H0701371
2. The sentence was to run consecutive to the sentence imposed in U.S. District Court Case #CR 0213-001-S-EJL
3. After being sentenced in Case No. H0701371, Defendant was delivered FORTHWITH into the custody of the Director of the State

Board of Correction of the State of Idaho. And was sent to ISCI on 08/21/08.

4. On 08/21/08, Defendant processed into the IDOC system and his sentenced began in Case #H0701371. (See Exhibit page 1)
5. On 08/25/08, after the Defendants sentence began at IDOC, IDOC Warden Hardison, at his discretion, then remanded Defendant over to U.S. Marshals to serve his sentence in Case #CR-0213-001-S-EJL.
6. Defendant was sent to a Federal Prison in Ca. and completed his sentence.
7. Defendant was never provided his Due process rights or given notification that his sentence that had already began at IDOC in Case No. H0701371, was halted, when IDOC Warden at his discretion choose to send the Defendant to a U.S. Federal Prison to do his State sentence.
8. Ada County District Court lost its jurisdiction on 08/21/08 when the Court remanded the Defendant over to the Director of the State Board of Corrections. In Case No. H0701371.
9. IDOC has the discretion to place an offender anywhere it chooses, to have the offender do his sentence.
10. By IDOC failing to provide the Defendant with his Due Process Right and or notification that IDOC was relinquishing its custody over to The U.S. Marshals, Defendants sentence was never halted, in Case No. H0701371
11. Defendant done 790 days on his State Conviction in a Federal Prison.

(R., pp.16-17 (verbatim).) Evans also filed a motion for a telephone hearing on his motion for credit for time served. (R., p.22.)

The district court subsequently entered an order denying Evans' motion for credit for time served, and also declined his request for a hearing on the matter. (R., pp.24-26.) The court determined that Evans' state judgment of conviction "clearly states that his sentence in this case was to run consecutively

to his federal sentence[,]" and while he "was in federal custody, he was clearly not incarcerated for his state offense[,]" and, therefore, "may not receive credit for the time spent in federal custody." (R., p.25.) Evans filed a timely notice of appeal from the court's order denying his motion for credit for time served (R., pp.27-31), and a motion for counsel on appeal (R., pp.36-38), which was initially denied (R., pp.39-40) but later granted (R., pp.49-52). About six weeks after the court denied Evans' motion for credit for time served, he filed a motion to reconsider that order (R., pp.41-48), which the court denied (R., pp.49-50). Evans, through appointed counsel, filed an amended notice of appeal. (R., pp.53-56).

ISSUE

Evans states the issue on appeal as:

Did the district court err when it denied Mr. Evans' motion for credit for time served?

(Appellant's Brief, p.4.)

The state rephrases the issue as follows:

Did the district court lack jurisdiction to consider Evans' motion for credit for time served, and even if it had jurisdiction, has Evans waived his argument because he failed to preserve it for appeal?

ARGUMENT

The District Court Lacked Jurisdiction To Consider Evans' Motion For Credit For Time Served, And Even If It Had Jurisdiction, Evans Has Waived His Argument Because He Failed To Preserve It For Appeal

A. Introduction

The district court concluded that Evans failed to show that while he was in custody on his federal offense, he was simultaneously incarcerated for his state offense. (R., p.24-26.) Although the district court was correct to refuse to grant Evans' motion for credit for time served, its basis for refusing to do so was misplaced. Under Idaho Criminal Rule 35(a), a court has jurisdiction to correct an illegal sentence at any time, which includes correcting an order illegally granting insufficient time for incarceration served *prior* to the court's order executing sentence.¹ Calculation of the sentence after it is executed, however, is the exclusive domain of the Idaho Department of Correction. Because the issue ultimately addressed by the court is not the legality of the sentence, but is instead whether certain time served after entry and execution of the judgment should have been considered time served when the Department of Correction executed

¹ Evans' motion for credit for time served relied solely on I.C. § 18-309, which states (emphasis added):

Computation of term of imprisonment. – In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration *prior to entry of judgment*, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

the sentence, the court lacked jurisdiction under Rule 35, and no other statute granted such jurisdiction.

In addition, even if the district court had jurisdiction, Evans failed to present to the district court the same issue he now argues on appeal. Therefore, he has waived the issue by failing to preserve it for appeal.

B. Standard Of Review

Jurisdiction is a question of law, given free review. State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003). The question of whether the sentence imposed is illegal is one of law, subject to free review by the appellate court. State v. Hale, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989).

C. Because The Issue Addressed By The District Court Was Not The Legality Of The Sentence, The Court Lacked Jurisdiction To Consider It

Under Idaho law, a district court's jurisdiction generally ends upon its judgment becoming final. State v. Jakoski, 139 Idaho 352, 79 P.3d 711 (2003); State v. Johnson, 75 Idaho 157, 161, 269 P.2d 769, 771 (1954); State v. Ensign, 38 Idaho 539, 223 P. 230 (1924). Here, after the Idaho Court of Appeals affirmed Evans' judgment of conviction and sentence, his case became final when the Remittitur was entered on October 5, 2009. (R., p.6.) A court maintains jurisdiction, however, to correct an illegal sentence. I.C.R. 35 (court may correct illegal sentence "at any time"). A motion for credit for time served is, in effect, a Rule 35 motion to correct an illegal sentence. State v. Rodriguez, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991). Whether a sentence is

illegal is a question of law. State v. Josephson, 124 Idaho 286, 858 P.2d 825 (Ct. App. 1993).

Under Idaho law, courts have responsibility to credit time served *before* execution of the sentence. See I.C. § 18-309. What credit must be granted *after* execution of sentence is within the jurisdiction of the Department of Correction. I.C. § 20-209A. Such calculations are reviewable by district courts only under a petition for writ of habeas corpus. See I.C. § 19-4203(2)(c). Jurisdiction to calculate when Evans was serving his state sentence transferred to the Department of Correction upon the district court's entry of the order executing the sentence. State v. Johnson, 75 Idaho 157, 161, 269 P.2d 769, 771 (1954) (after final judgment executing sentence "all matters regarding the execution are transferred to the State Board of Correction"). How the Department of Correction calculated Evans' time against his sentence, even if it erroneously refused to credit time he was entitled to, did not render the sentence itself illegal.

Because the question addressed by the district court -- whether the Department of Correction must count the time Evans served for his federal offense as time served against his state court sentence -- is not a question in any way related to the legality of the sentence itself, and because Rule 35 confers jurisdiction only to review the legality of the sentence, the district court lacked jurisdiction in the criminal case to enter a post-judgment order regarding calculation of the service of sentence.

D. Even If The District Court Had Jurisdiction, Evans Has Waived His Issue On Appeal Because He Failed To Present It To The District Court

In the district court, Evans argued that, because he spent four days in the IDOC new inmate processing facility before he was transferred to a federal facility, his entire time in the federal facility counted toward time served on his state conviction. (R., pp.16-17, 41-45.) He first contended that because he was not notified after being placed at IDOC on August 21, 2008 that he was to begin serving his federal sentence four days later, the time he was serving for his state offense was never halted, and continued during the entire time he was in federal custody. (R., pp.16-17.) After the district court entered an order denying Evans' motion for credit for time served (R., pp.24-26), he filed a motion to reconsider (R., pp.41-45). In that motion, Evans contended that because his state sentence could not legally be served in "installments," he had to be given credit for all the time served in continued custody (including federal) after he was placed in the IDOC facility on August 21, 2008. (R., pp.44-45.)


However, on appeal, Evans is not seeking credit for time served while he was incarcerated in the federal prison system. Rather, he is seeking credit for the four days he spent in an IDOC facility prior to being transferred to a federal facility. (Appellant's Brief, pp.5-8.) Because Evans did not present that argument in the district court, he has not preserved that issue for appellate review. The Idaho Supreme Court has long recognized the rule that an appellate court will not consider an issue raised for the first time on appeal. Row v. State, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001) (citing State v. Fodge, 121 Idaho 192, 824 P.2d 123 (1992)). On appeal, a party must be held to the theory upon

which the cause was tried in the lower court. Robinson v. Spicer, 86 Idaho 138, 145, 383 P.2d 844, 849 (1963). Therefore, Evans' argument seeking credit for time served for the four days he was initially placed in an IDOC facility -- made for the first time on appeal -- must be denied.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Evans' motion for credit for time served.

DATED this 28th day of March, 2013.

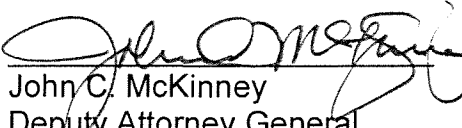

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of March, 2013, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing file stamped copies addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


John C. McKinney
Deputy Attorney General

JCM/pm